IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1212

MABLE HURLBUTT GOSTOUT, *Appellant,*

v.

PETER P. HALE, BANKRUPT, *Appellee*

On Appeal from the United States District Court for Connecticut

JURISDICTIONAL STATEMENT

MICHAEL J. WHALEN, Esq.
205 Church Street
New Haven, Connecticut 06510
(203) 787-2239
Attorney for Appellant

MABLE HURLBUTT GOSTOUT
Box 763
Lakeville, Connecticut 06039
(203) 824-0403
Appellant, in propria persona

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OPINIONS BELOW

This appeal involves the validity of a Connecticut superior court judgment and the constitutionality of a Connecticut statute. The opinions of the Connecticut superior court, the district court, and subsequent opinions and orders are unreported. They are reprinted herein as Appendices.

JURISDICTION

1. The case before the Court was initiated by the appellant as a Creditor's Bill in Equity. This post-judgment remedy is set forth in the Connecticut General Statutes as Title 52 Section 321. The appellant obtained a judgment in the Superior Court for New Haven County, Connecticut on July 26, 1972 (see Appendix A.). The district court (in bankruptcy declared the Connecticut judgment a nullity and Connecticut General Statute 52-321 unconstitutional on September 27, 1973.

2. The orders sought to be reviewed are as follows: Appendix – A) Judgment of the Superior Court for Connecticut at New Haven, dated July 26, 1972; B) Order on Petition for Determination of Interests (Trevethan, J.) dated September 27, 1973; C) United States District Court Memorandum of Decision (Newman, J.) dated June 14, 1974; D) Denial of Motion to Reconsider (Newman, J.) dated November 27, 1974 – N.B. Decision not sent to counsel until May 8, 1975; E) U.S. Court of Appeals – Order on Motion to Dismiss dated August 12, 1975; F) U.S. Court of Appeals – Denial of Motion for Rehearing dated September 23, 1975; and G) U.S. Court of Appeals – Order denying Motion for Remand dated October 1, 1975.

Notice of Appeal to the United States Supreme Court was filed October 20, 1975 with the United States District Court for Connecticut at New Haven and with the United States Court of Appeals for the Second Circuit, Foley Square, New York, New York.

3. Jurisdiction of this appeal is conferred by 28 U.S.C. 1254, or alternatively, by 11 U.S.C. 47.

4. Cases believed to sustain the jurisdiction are: *Watson v. Employers Liability Assurance Corporation, Ltd.* et al., 348 U.S. 66 (1954); *Dutton v. Evans*, 400 U.S. 74; *Pickens v. Roy*, 23 S. Ct. 78 (1902); *Metcalf v. Barker*, 187 U.S. 165, 174 (1902); *Lion Bonding and Surety Co. v. Karatz*, 262 U.S. 77, 90 (1923); *Nelson et al v. County of Los Angeles.*

QUESTIONS PRESENTED

1. Did the bankruptcy judge err in taking jurisdiction of the trust res after the Superior Court for New Haven County, Connecticut had exercised jurisdiction and entered a judgment?

2. Did the bankruptcy judge err in declaring Connecticut General Statute 52-321 unconstitutional?

3. Did the district court err in exercising jurisdiction over the trust res?

4. Did the district court err in considering matters not litigated in the state court or in the bankruptcy court?

5. Did the district court err in denying the appellant's Motion to Reconsider?

6. Did the court of appeals err in dismissing the appeal?

7. Did the court of appeals err in denying appellant's Motion for Rehearing?

8. Did the court of appeals err in denying appellant's Motion for Remand?

STATEMENT OF THE CASE

The appellant brought a Creditor's Bill in Equity in the Superior Court, County of New Haven, State of Connecticut. In said action the appellant recited the entry of a judgment against the defendant debtor, Peter P. Hale. Said action named the judgment debtor as a defendant and the Union Trust Company, a banking institution existing under the laws of the State of Connecticut and located in said state as a defendant and as a garnishee. Said action was instituted and litigated pursuant to Connecticut General Statute 52-321 (copy attached). Judgment was entered in that action on July 26, 1972 (Appendix A.)

On July 7, 1972, the judgment debtor filed a Petition in Bankruptcy and thereafter the bankrupt, rather than the trustee in bankruptcy and apparently without standing, filed an application for a determination of the interest of the trustee in

bankruptcy to a certain trust fund held by the defendant-garnishee Union Trust Company.

On September 27, 1973, the Honorable Robert E. Trevathan entered an order declaring Connecticut General Statute 52-321 to be unconstitutional and further declaring the judgment of the Superior Court for the State of Connecticut to be a nullity. This order entered in spite of the fact that appellant garnisheed the trust fund more than four months prior to bankruptcy, there was no appeal of the Superior Court judgment and the decision of the bankruptcy judge rested on a decision handed down six months after the superior court judgment (see Order on Trustee's Petition – Appendix B).

On a review of the order of the bankruptcy judge the district court (Newman, J.) on June 14, 1974 entered an order declaring the trust to be a spendthrift trust and remanded the matter to the bankruptcy judge for further hearing. Following that hearing the appellant filed a Motion to Reconsider which was denied by the district court on November 27, 1974. While that denial was entered on November 27, 1974 the decision was not communicated to counsel until May 8, 1975. Thereafter, on June 2, 1975 the appellant filed a Notice of Appeal with the court of appeals. Said appeal was dismissed by order of the court of appeals on August 12, 1975.

A Motion for Rehearing was denied on September 23, 1975 and a Motion for Remand was denied on October 1, 1975. A Notice of Appeal to the Supreme Court was filed on October 20, 1975.

Federal questions were presented on the Petition for Review to the district court and in the brief in support of the appellant. The Federal questions were set forth as follows:

1. Did the Referee in Bankruptcy err giving retroactive effect to the decision in *Lynch v. Household Finance Corp.*, U.S.D.C. of Conn., Civil No. 13-737 (decided 1/12/73)?

2. Did the Referee in Bankruptcy err in holding that Connecticut General Statute 52-321 is unconstitutional?

3. Did the Trustee err in finding that the judgment of the Superior Court was a nullity against the Trustee in Bankruptcy and constituted an ineffectual judicial act?

THE QUESTIONS ARE SUBSTANTIAL

A. The Bankruptcy Court, in Exercising Jurisdiction in this Matter Usurped the Jurisdiction of the State Court in Contravention of the Doctrine of Res Judicata and in Contravention of Existing Law.

The doctrine of res judicata makes a final, valid judgment conclusive on the parties, and those in privity with them, as to all matters, fact and law, that were or should have been adjudicated in the proceeding. The appellant herein, Mable Hurlbutt Gostout, instituted a Creditor's Bill in Equity by writ and complaint dated January 24, 1972 and contemporaneously garnished the trust fund set up by the Will of Ruth Powers Hale and in the hands of the defendant-garnishee Union Trust Company. It is noted that said garnishment preceded the filing of the bankruptcy petition by more than four months. Judgment entered in the superior court action on July 26, 1972. Thereafter, on June 27, 1973, almost one year after the judgment in the Superior Court for New Haven County, Connecticut the bankrupt filed a Motion for Determination of Interest in the bankruptcy court (see Record on Appeal). The bankruptcy referee declared the state judgment a nullity on the basis that the garnishment-execution statute was unconstitutional. It is respectfully submitted that the constitutionality of that statute is not within the purview of the bankruptcy referee's jurisdiction. In *Roth v. United States*, 339 F. 2d 861 (1964) in which the doctrine of res judicata was involved the court held:

> "The state court had jurisdiction of the subject matter and of the parties; no more is required to make the judgment conclusive." p. 861 citing *Daniels v. Thomas*, 10 Cir., 225 F. 2d 795, 797, cert. denied, 350 U.S. 932, 76 S. Ct. 303, 100 L. Ed. 815.

The *Roth* Court citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, at 415, 44 S. Ct. 149, at 150, 68 L. Ed. 556 further stated:

> "If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and

their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication." *Roth v. United States*, (supra), at p. 861.

It was further stated in the case of *Pickens v. Roy*, 23 S. Ct. Rep. 78:

> "That as the circuit court of Barbour County had at the time of the adjudication, and had had for years, complete jurisdiction, and control over the bankrupt and his property, that jurisdiction was not divested by the proceedings in bankruptcy, and it was the right and duty of that court to proceed to final decree notwithstanding adjudication, the rule being applicable that the court which first obtains rightful jurisdiction over the subject-matter should not be interfered with. *Frazier v. Southern Loan & T. Co.*, 40 C.C.A. 76, 99 Fed. 707. And Goff, J. speaking for the Court, said: 'The bankrupt act of 1898 does not in the least modify this rule, but with unusual carefulness guards it in all of its details, provided the suit pending in the state court was insituted more than four months before the district court of the United States had adjudicated the bankruptcy of the party entitled to or interested in the subject-matter of such controversy'." *Pickens v. Roy*, (supra page 79).

In *Walutes v. Baltimore Rigging Company*, 390 F. 2d 350, 352 (1968) the Court held:

> "Service of the writ of attachment by way of garnishment on Frederick created in Baltimore Rigging an inchoate lien on Bankrupt's property, credit or funds in the hands of Frederick at the time of service, which, in this case was May 31,

> 1963, and judgment may be rendered thereon even after filing of bankruptcy."

In discussing the language of the Bankruptcy Act, the United States Supreme Court said in *Metcalf v. Barker*, 187 U.S. 165, at 174, 23 S. Ct. 67, at 71, 47 L. Ed. 122.

> "In our opinion the conclusion to be drawn from this language is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months the property is discharged therefrom, but not otherwise. A judgment or decree in enforcement of an otherwise valid preexisting lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. If this were so, the date of the acquisition of a lien by attachment or creditor's bill would be entirely immaterial. The lien acquired by levy of the attachment more than four months prior to bankruptcy was not lost by reason of the bankruptcy and such liens have been recognized as valid and subsisting for the purposes of bankruptcy proceedings."

Also, the case of *American Cast Iron Pipe Co. v. Statesmen Insurance Company*, 343 F. Supp. 860, 865 (1972) wherein the court held,

> "If the Plaintiff believes that the liquidator had nc right to the res in the first instance, or the court to enter the injunctive order, *then it should go to that court and present its preference argument.* As the Supreme Court stated in *Lion Bonding and Surety Co. v. Karatz*, 262 U.S. 77, 90, 43 S. Ct. 480, 485, 67 L. Ed. 871 (1923)" (emphasis added).
>
> ". . . But, if the legality of the state court's ac-

tion was to be questioned, it could be done only by laying the proper foundation through appropriate proceedings in that court. *Covell v. Heyman*, 111 U.S. 176, 179, 4 S. Ct. 355, 28 L. Ed. 390 (1883); *Byers v. McAuley*, 149 U.S. 608, 614, 13 S. Ct. 906, 37 L. Ed. 867; Compare *Laing v. Rigney*, 160 U.S. 531, 16 S. Ct. 366, 40 L. Ed 525; *Metcalf v. Barker*, 187 U.S. 165, 23 S. Ct. 67, 47 L. Ed. 122; *Pickens v. Roy*, 187 U.S. 177, 23 S. Ct. 78, 47 L. Ed. 128; *Murphy v. John Hoffman Co.*, 211 U.S. 562, 569, 29 S. Ct. 154, 53 L. Ed. 327. If such action had been taken and relief had been denied there, resort could then have been had to appellate proceedings. *Wiswall v. Sampson*, 14 How. 52, 14 L. Ed. 322. *But the judgment of the state court, which had possession of the res, could not be set aside by a collateral attack in the federal courts. Mutual Reserve Fund Life Association v. Phelps*, 190 U.S. 147, 159-160, 23 S. Ct. 707, 47 L. Ed. 987. Nor could it be ignored. *Shields v. Coleman*, 157 U.S. 168, 15 S. Ct. 570, 39 L. Ed. 660." (emphasis added).

Further,

> "*Drachenberg v. Drachenberg*, 67 A. 2d 892, 893-894. Also *Atlanta Flooring and Installation v. Russell*, 145 F. 2d 495, 496. *Town of Agwam v. Connors*, 159 F. 2d 360, 363. *Norlanco, Inc. v. County of Madison*, 181 NW 2d 119, 123."

As to the development of the law regarding the doctrine of res judicata the appellant respectfully directs the Court's attention to *Flynn v. State Board of Chiropractic Examiners* (CA 9th, 1969) 418 F. 2d 668, wherein the Court held:

> "It is immaterial whether or not the constitutional issues were actually litigated in appellant's state court action, because we are here concerned with the application of that branch of the res judicata doctrine known as bar and not with the branch known as collateral estoppel."

Also, *Small Business Administration v. Taubman*, 459 F. 2d 991, 992; *Texas International Airlines, Inc. v. C.A.B.*, 473 F. 2d 1150, 1151 (1972); *Francisco Enterprises, Inc. v. Kirby*, 482 F. 2d 481, 484 (1973); *Hutcherson v. Lehtin*, 485 F. 2d 567, 569 (1973); *County of Lancaster v. Philadelphia Electric Co.*, 386 F. Supp. 934, 938 (1975).

B. The Appellant's Notice of Appeal to the Court of Appeals Filed June 9, 1975 was Timely in Regard to the Order of Remand Dated June 14, 1974 in that Said Order was Not a Final Judgment.

Rule 4(a) of the Rules of Appellate Procedure provides in part:

> "The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50 (b); (2) granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket."

As has been stated in Point II. B in the brief of the appellees Peter P. Hale and Union Trust Company, Rule 4 (a) Federal Rules of Appellate Procedure refers to court action based on Rules 50 (b), 52 (b) and Rule 59. It is also true that in order for the order or judgment of the court to be appealable the judg-

ment or order must be final and conclusive to the issues before the court. In Judge Newman's Memorandum of Decision (Appendix C.), the court remanded the case to the bankruptcy referee, stating as follows:

> "Because the parties have not fully litigated the issue of whether the bankrupt's interest in trust property is liable to the claim of his creditors, the case is remanded to the Bankruptcy Judge for consideration of the admissibility of extrinsic evidence to vary the terms of Ruth Hale's testamentary trust, and if such extrinsic evidence is admissible, for a determination of whether the bankrupt's interest in trust income is isolated from his creditors pursuant to the spendthrift provisions of Connecticut General Statute 52-321."

Clearly this order did not finally determine the issues before the court and contemplated further hearing. The appellant Mable Hurlbutt Gostout relies strongly on the case of *Carnes v. United States*, 279 F. 2d 378, 379-380 (10th Cir.); cert. denied 364 U.S. 846, 81 S. Ct. 88, 5 L. Ed. 2d 69 (1960) as to the governing law on the question of the finality of a judgment. In that case it was held that:

> ". . . when a judge acts in a manner which clearly indicates his intention that the act shall be the *final one in the case*, and a notation of the act has been entered on the docket, the time to appeal begins to run, but if it is not clearly indicated that the judge's act was intended to be his final act in the case, then the time for appeal does not begin to run." (emphasis added). *Carnes v. United States*, (supra), at pages 379-380.

The mere fact that the court sent the case back to the bankruptcy referee for an evidentiary hearing is evidence that the case was not finally terminated so as to commence the running of the appeal period.

C. Appellant's Motion for Remand Should Have Been Granted by the Court of Appeals.

As to the propriety of moving for remand during appellate proceedings, the appellant directs the Court's attention to the case of *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 71 S. Ct. 534, 95 L. Ed. 702 (1950), wherein it held:

> "To permit a federal trial court to enter a judgment in a case removed without right from a state court where federal court could not have original jurisdiction of the suit even in the posture it had at the time of judgment would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them." *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 18.

Also, on the topic of remand, 15 *Minnesota Law Review* 720, 721.

As to the timeliness of a motion for remand, *United Steelworkers v. International T. & T. Corp.*, 133 F. Supp. 602, 605; *Perrin v. Walker*, 385 F. Supp. 945, (1974).

D. The Referee in Bankruptcy Erred in Holding Connecticut General Statute 52-321 Unconstitutional.

The referee in bankruptcy in great measure seems to base his order on his view that Connecticut General Statutes, Section 52-321, is unconstitutional under the case of *Lynch v. Household Finance*, U.S.D.C., Conn., Civil No. 13-737, decided 1/12/73, because similar to 52-329, "it fails to provide for a hearing upon notice prior to garnishment", *Referee's Order*, page 4, para. 1.

The difference between Connecticut General Statute 52-329 and 52-321 is inescapable. 52-329 provided for a creditor's *pre*-judgment remedy while 52-321 deals exclusively with *post*-judgment remedy.

The statute specifically states:

> "Any creditor of such beneficiary who has secured a judgment against such beneficiary may bring an action against him and serve such trus-

> tee with garnishee process, and the court to which such action is returnable may direct such trustees (sic) to pay over the net income derived from such trust estate to such judgment creditor, as the same shall accrue, until his debt is satisfied." C.G.S. 52-321.

The decision in the *Lynch* case was based on denial of due process. The entire thrust of the court's decision was that a party under 52-329 was deprived of property without a prior hearing. Connecticut General Statute 52-321 not only provides that the debtor have the opportunity of a prior hearing but provides that the creditor must have obtained a judgment against the debtor. To analogize the two statutes and to base an order upon such analogy is error.

E. The Trustee Erred in Finding that the Judgment of the Superior Court was a Nullity Against the Trustee in Bankruptcy and Constituted an Ineffectual Judicial Act.

The referee, in his order, found that the decision of the superior court dated July 26, 1972 was a nullity and was "an ineffectual judicial act". *Referee's Order*, p. 4. The appellant contends that the referee was without power to make such a determination.

> "Where proceeding in rem is instituted before petition in bankruptcy is filed, state court obtains jurisdiction of property, and where valid lien exists for more than four months prior to filing of petition, bankruptcy court is without power to enjoin prosecution of action by lien creditors instituted prior to filing of petition, but if lien is proscribed by this title, the proceeding may not be continued to create or enforce invalid lien." *City of Utica v. Gold Medal Packing Corp.*, 277 N.Y.S. 20 543, 52 Misc. 20 968, (1967).
>
> "If a state court of competent jurisdiction has taken cognizance of an action to establish or enforce a lien on property of a debtor, and the action is pending at the time of his adjudication

> in bankruptcy, but the lien is not dissolved thereby, because it attached more than four months previously, the jurisdiction of the state court is not divested by the bankruptcy proceedings, and the federal court has no rightful authority to enjoin the creditor from the further prosecution of this action. *Metcalf v. Barker*, N.Y. 1902, 23 S. Ct. 67, 187 U.S. 165, 47 L. Ed. 122, 9 Am. Bankr. Rep. 36; See also *Pickens v. Roy*, W. Va. 1902, 23 S. Ct. 78, 187 U.S. 177, 41 L. Ed. 128, 9 Am. Bankr. Rep. 47; *In re Wagner's Estate*, D. C. Pa. 1913, 206 F. 364, 30 Am. Bankr. Rep. 396; *In re United Wireless Telegraph Co.*, D.C.N.J. 1911, 192 F. 238, 27 Am. Bankr. Rep. 1; *In re Shinn*, D.C.N.J. 1911, 185 F. 990, 25 Am. Bankr. Rep. 833; *New River Coal Land Co. v. Ruffner Bros.*, W. Va. 1908, 165 F. 881, 91 C.C.A. 559, 20 Am. Bankr. Rep. 100; *In re Baughman*, D.C. Pa. 1905, 138 F. 742, 15 Am. Bankr. Rep. 23; *Pickens v. Dent*, W. Va. 1901, 106 F. 653, 45 C.C.A. 522, 5 Am. Bankr. Rep. 664, affirmed 23 S. Ct. 78, 187 U.S. 177, 47 L. Ed. 128, 9 Am. Bankr. Rep. 47; *Ex parte Donaldson*, D.C. Pa. 1867, Fed. Case No. 3,981; *Clarke v. Rist*, C.C. Ohio 1844, Fed. Case No. 2,861; *Croft v. Croft* 1932, 157 A. 843, 109 N.J. Eq. 427, 19 Am. Bankr. Rep. N.S. 320."

Also,

> "Where a state court has obtained complete jurisdiction by hostile proceedings, which creditors have instituted for the enforcement of their demands, and in which creditors have acquired liens on property more than four months before the filing of the petition in bankruptcy, the disposition of the property for payment of the liens should be left to the state court, without interference from the court of bankruptcy." *Griffin v. Lenhart*, C.C.A. W. Va. 1920, 266 F. 671, 45 Am. Bankr. Rep. 221.

The appellant further refers the Court to U.S.C.A. 11 Sec. 107 notes, 331, 338 and 342. The appellant contends that that section and the cases decided under it establish that the referee had no power to declare the judgment of the superior court a nullity and the issue was res judicata at the time of the referee's order.

> "Bankruptcy court in proceedings upon involuntary petition in bankruptcy, did not have summary jurisdiction over bank account of debtor where creditor, more than four months prior to filing of bankruptcy petition, had commenced action by writ of foreign attachment against such asset although no judgment in creditor's action had yet been obtained as of time of filing of bankruptcy petition." *In re Consolidated Container Carriers, Inc.*, D.C. Pa. 1966, 254 F. Supp. 605, affirmed 385 F. 2d 362.

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that the referee erred in taking jurisdiction of this matter, the referee erred in giving retroactive effect to the *Lynch* case, the referee erred in holding Connecticut General Statute 52-321 unconstitutional and committed further error in declaring the judgment of the superior court a nullity.

Respectfully submitted,

MICHAEL J. WHALEN, Esq.
205 Church Street
New Haven, Connecticut 06510
Attorney for the Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have this day, the 18th day of February, 1976, mailed three copies of this Brief to the Attorneys for all parties to the proceedings: namely, Robert Billings, Attorney for Bankrupt-Peter P. Hale, 155 North Main Street, Wallingford, Connecticut; Robert L. Fay, Attorney for Defendant, Union Trust Company, 86 North Main Street, Wallingford, Connecticut; and Herman S. Hodes, Attorney, Trustee in Bankruptcy, 273 Orange Street, New Haven, Connecticut.

By Michael J. Whalen
Michael J. Whalen

APPENDIX

APPENDIX A.

STATE OF CONNECTICUT

NO. 129865

MABLE HURLBURT GOSTOUT, of the Town of Salisbury, County of Litchfield, State of Connecticut,

Plaintiff

SUPERIOR COURT

NEW HAVEN COUNTY
at New Haven

vs.

PETER POWERS HALE, of the Town of Wallingford, County of New Haven, State of Connecticut, and THE UNION TRUST COMPANY, located in the City and County of New Haven, State of Connecticut,

Defendants

JULY 26, 1972

PRESENT: Honorable Joseph W. Bogdanski, Judge

JUDGMENT

This action, by writ and complaint dated January 24, 1972 praying that the defendants be enjoined from paying over and from receiving any funds under a trust created by the Will of Ruth Powers Hale and that the same be applied to the satisfaction of the partially unsatisfied portion of the plaintiff's judgment and interest entered by this Court on May 17, 1962 in an action entitled *Mable Hurlburt vs. Peter Powers Hale* together with costs of this action, came to this Court on the second Tuesday of February, 1972, and thence to April 10, 1972, when the defendant, The Union Trust Company, filed an an-

swer and thence to April 14, 1972, when the defendant, Peter Powers Hale, filed an answer, and thence to May 31, 1972, when the plaintiff filed a motion for summary judgment with supporting affidavit, and thence to July 14, 1972, when the parties appeared and were heard by the Court on said motion for summary judgment, no opposing affidavits or other documentary evidence having been filed by the defendants, and when the court entered an interlocutory summary judgment of liability in favor of the plaintiff against the defendants, as on file, and thence to the present time when the plaintiff filed an affidavit of debt, and when the plaintiff and the defendant, Union Trust Company, appeared and were heard by the Court, the defendant, Peter Powers Hale, failing to appear to be heard.

The Court, having heard the aforesaid parties, finds the allegations of the complaint true and further finds that the plaintiff has an unsatisfied judgment against the defendant, Peter Powers Hale, in the amount of $17,544.35 damages.

WHEREUPON, it is adjudged that if and when the defendant, Union Trust Company, should become the trustee under a trust created by the Will of Ruth Powers Hale, dated July 17, 1964 and amended by a codicil dated September 20, 1967 for the benefit of Peter Powers Hale, then at such time Union Trust Company shall be enjoined from paying over to the defendant, Peter Powers Hale, any income or principal as the same shall accrue under said trust and it is further adjudged that if and when the defendant, Union Trust Company, should become the trustee under said trust as aforesaid for the benefit of Peter Powers Hale at such time any such payments of income or principal as the same shall accrue for the benefit of said Peter Powers Hale shall be paid by the defendant, Union Trust Company, to the plaintiff, and the same shall be applied to the unsatisfied judgment; to wit: $17,544.35, plus interest thereon from this date, plus the costs of the action taxed at $ _____.

And it is further adjudged that the defendant, Peter Powers Hale, be and he hereby is enjoined from receiving any such payment of income or principal from said trust.

_____
Judge

APPENDIX B.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

In the Matter of PETER P. HALE, Bankrupt	In Bankruptcy No. 37814

ORDER ON TRUSTEE'S PETITION FOR DETERMINATION AS TO BANKRUPTCY ESTATE'S INTEREST IN THE ESTATE OF RUTH POWERS HALE

The trustee in bankruptcy filed a petition which in total effect requested this court to determine the rights of the bankruptcy estate, the bankrupt and Mabel Hurlburt Gostout (Gostout) in the bankrupt's interest in the estate of his deceased mother, Ruth Powers Hale (Hale). Duly noticed hearing was held on this petition at which the trustee, the bankrupt, the Bank and Gostout appeared.

The facts are that the bankrupt was a beneficiary of one of the trusts set up under the Hale Will and Codicil of which The Union & New Haven Trust Company (Bank) was the trustee. By a writ, summons and complaint dated January 24, 1972 Gostout brought suit against the bankrupt and the Bank, alleging that the bankrupt owed her a judgment debt of about $16,000.00 and seeking to have the funds in which the bankrupt had an interest under the Hale Will and Codicil applied to the satisfaction of the judgment debt. The writ commanded the sheriff to attach the goods or estate of the bankrupt to the value of $20,000.00. It also commanded the sheriff, consistent with historic ganishment proceedings in this State, to leave a true copy of the writ and complaint with the Bank "as it is the agent, trustee and debtor of said defendant and has concealed in its hands the goods, effects and estate of said defendant and (is) indebted to the defendant". Service of this writ was made by

the sheriff on the bankrupt and the Bank as evidenced by the return of service dated January 27, 1972.

This bankruptcy was commenced on July 7, 1972. Nineteen days thereafter, on July 26, 1972, the Superior Court for New Haven County rendered judgment on the Gostout complaint and decreed that, when the Bank shall become the trustee of a trust for the benefit of the bankrupt under the Hale Will and Codicil, then the Bank shall be enjoined from paying, and the bankrupt enjoined from receiving, any of the interest or principal under the trust but that it shall be paid to Gostout as it accrues to be applied upon the judgment debt owed to her by the bankrupt.

It was stipulated by the parties that, at the time the Gostout suit on the judgment debt was brought, the Bank had not been appointed as trustee under the Hale Will and Codicil and no funds had been transferred by the Bank, as executor, to itself, as trustee, to fund the trust of which the bankrupt was beneficiary; that this was also the situation when the state court judgment was rendered on July 26, 1972; and that at the present time the Bank has qualified as trustee of the trust.

Gostout contends that, more than four months prior to bankruptcy, she made a valid garnishment under Connecticut statutes secs. 52-321 and 52-329 of the interest of the bankrupt under the Hale Will and Codicil. The trustee and the bankrupt contend that no valid garnishment was made of the bankrupt's interest pursuant to the Connecticut statutes, and that, in any event, these Connecticut statutes providing for garnishment are unconstitutional because of denial of due process.

No valid garnishment was made under section 52-329 of the Connecticut statutes inasmuch as that statute has been declared unconstitutional by a three judge court of the United States District Court for the District of Connecticut because it permits of garnishment without prior hearing and notice thereof accorded the defendant whose property rights are subjected to the garnishment (*Lynch v Household Finance Corp.*, U.S.D.C. of Conn., Civil No. 13,737, dec'd 1/12/73).

Sec. 52-321 of the statutes provides that whenever "property has been given to trustees to pay over the income to any person . . . such income shall be liable in equity to the claims of

all creditors of such beneficiary"; that any judgment creditor of the beneficiary may bring an action against him and serve "such trustee" with garnishee process; and that the court may direct "such trustee" to pay over the net income derived "from such trust estate" to the judgment creditor as the same may accrue and until the debt is satisfied. By the express terms of this statute the income of a trust can only be garnisheed when there is a trustee holding property in trust with income being produced to which the defendant is entitled. Here, when the Bank was garnisheed it was not a trustee holding property to the income of which the bankrupt was entitled. The Bank was then only the executor holding the general estate of Hale. No trust fund had yet been established for the benefit of the bankrupt. The bankrupt had no right to any of the income accruing during the administration of the estate since, as provided by Article Fifth of the Will, the income accumulated during the administration of the estate was to become a part of the principal of the trust fund. Thus, even assuming sec. 52-321 to be a viable statute, the garnishment process served on the Bank was ineffective to catch what did not then exist but only later came into being.

But, even more conclusive, it is this court's view that section 52-321 is also unconstitutional under the *Lynch* case because, similar to section 52-329, it fails to provide for a hearing upon notice prior to garnishment. It follows as was true of the attempted garnishment under section 52-329 in the *Lynch* case – that any garnishment attempted by Gostout under section 52-321 was a nullity.

Also, the judgment of the Superior Court for New Haven County rendered after bankruptcy was a nullity as against the trustee in bankruptcy. The trustee's title to the nonexempt property of the bankrupt sprang into existence on the date of bankruptcy. It is fundamental law that no creditors' interests superior to those of a trustee in bankruptcy can be created after bankruptcy in property which has passed to a trustee in bankruptcy. Since the garnishment was invalid, the judgment constituted an ineffectual judicial act after bankruptcy which created no creditor's rights in property to which the trustee in bankruptcy already had title.

No issue was raised at the hearing as to whether or not the bankrupt had any rights to an interest under the Will and Codicil which did not pass to the trustee in bankruptcy. In the memorandum of law submitted by the bankrupt he stated that "he asserts his belief that any rights which he may have under the provisions of his mother's will should accrue to the trustee in bankruptcy and not to any one of his individual creditors." Accordingly, there is no issue of property rights as between the bankrupt and the trustee which is before this court for resolution.

Resultant from what has here been said, it is

ORDERED that Gostout's garnishment of the Bank is a nullity, that Gostout has no right to any beneficial interest under the Hale Will and Codicil which passed to the trustee in bankruptcy, and that the judgment rendered after bankruptcy by the Superior Court for New Haven County on the Gostout complaint is a nullity as to any beneficial interest under the Hale Will and Codicil which passed to the trustee in bankruptcy.

Dated at Bridgeport, September 27, 1973.

R. E. Trevethan
Referee in Bankruptcy

APPENDIX C.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

In The Matter of PETER P. HALE, Bankrupt	In Bankruptcy No. 37814

NOTICE OF APPEAL TO DISTRICT COURT

Mabel Hurlburt Gostout appeals to the District Court from the Order of the Referee entered in this case on September 27, 1973, determining the rights of the Bankruptcy Estate in the Estate of Ruth Powers Hale. The parties to the order appealed from, in the names and addresses of their respective attorneys, are as follows:

Attorney Robert Billings,
Attorney for Peter Powers Hale, Bankrupt
115 North Main Street
Wallingford, Connecticut 06492

Attorney Herman Hodes,
Trustee in Bankruptcy
269 Orange Street
New Haven, Connecticut 06510

Attorney Robert Fay,
Attorney for The Union Trust Company
86 North Main Street
Wallingford, Connecticut 06492

Dated at New Haven, October 3, 1973.

MICHAEL J. WHALEN,
Attorney for Appellant
205 Church Street
New Haven, Connecticut 06510

I hereby certify that a copy of the foregoing was mailed this day postage prepaid to all counsel of record.

APPENDIX D.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

In the Matter of

PETER P. HALE, Bankrupt } BANKRUPTCY NO. 37814

MEMORANDUM OF DECISION

This is a petition for review of an order of the Bankruptcy Judge. The issue is whether the bankrupt's inheritance rights under a testamentary trust can be garnished by a state judgment creditor or claimed by the trustee in bankruptcy as an asset of the bankruptcy estate.

The facts leading up to the current controversy are not in dispute. In May, 1962, appellant Mabel Gostout obtained a state court judgment for the amount of $11,973.10 against Peter Hale. On January 24, 1972, she brought an action in the Connecticut Superior Court for New Haven County against Hale and the Union Trust Company, the trustee of a testamentary trust created by Ruth Hale. She alleged that her 1962 judgment remained partially unsatisfied and garnished the trust income and principal that would become payable to Hale after his mother's testamentary trust was eventually funded and administered by the Union Trust Company. Conn. Gen. Stat. §§ 52-321 and 52-329.[1]

1) Conn. Gen. Stat. §52-321 provides in pertinent part:

> Whenever property has been given to trustees to pay over the income to any person, without provision for accumulation or express authorization to the trustees to withhold such income, and the income has not been expressly given for the support of the beneficiary or his family, such income shall be liable in equity to the claims of all creditors of such beneficiary. Any creditor of such beneficiary who has secured a judgment against such beneficiary may bring an action against him and serve such trustee with garnishee process, and the court to which such action is returnable may direct such trustees to pay over the net income derived from such trust estate to such judgment creditor, as the same may accrue, until his debt is satisfied. . . .

Judgment had not been rendered in the state action when Peter Hale was adjudicated bankrupt on July 7, 1972. However, on July 26, 1972, the Superior Court enjoined the trustee from paying Hale any trust income and principal after the trust had been funded and ordered it to pay trust income and principal accruing for the benefit of Peter Hale to Mabel Gostout for the satisfaction of Hale's partially unsatisfied judgment debt.

On July 7, 1973, the trustee in bankruptcy filed a petition requesting the Bankruptcy Judge to determine whether the bankrupt's inheritance rights under his mother's testamentary trust had been validly garnished by the appellant or whether they were an asset in the bankruptcy estate. Judge Trevethan ruled that the bankrupt's beneficial interest in the trust passed to the trustee in bankruptcy because the appellant's garnishment pursuant to Conn. Gen. Stat. § § 52-329 and 52-321 was a nullity and the bankrupt had agreed that his inheritance rights should accrue to the trustee in bankruptcy.[2]

This appeal followed. Since the Bankruptcy Court has authority to consider an issue that is presented by the record on review, though not litigated, see *In Re Samuel Wilde's Sons*, 144 F. 972 (2d Cir. 1906), this Court has examined the provisions of Ruth Hale's testamentary trust to determine whether under Connecticut law the bankrupt's beneficial interest in trust income and principal is liable to the claims of any of his creditors, including the trustee in bankruptcy.

2) The Bankruptcy Judge declared the appellant's garnishment pursuant to Conn. Gen. Stat. §§52-329 and 52-321 a nullity because he determined that the decision in *Lynch* v. *Household Finance Corp.*, 360 F.Supp. 720 (D. Conn. 1973), declaring Conn. Gen. Stat. §52-329 unconstitutional, should be applied retroactively; Conn. Gen. Stat. §52-321 is also unconstitutional under the *Lynch* decision because it permits garnishment without prior notice and hearing; even if Conn. Gen. Stat. §52-321 were not unconstitutional, a trust fund had not yet been established for the benefit of the bankrupt at the time of the garnishment, and by the express terms of Conn. Gen. Stat. §52-321, income of a trust can only be garnished when there is an existing trust; and since title to the bankrupt's inheritance rights had already passed to the trustee in bankruptcy on July 7, 1972, the date of bankruptcy, the Superior Court judgment rendered on July 26, 1972, could not afford the appellant a superior right to the trust income and principal.

Pursuant to Conn. Gen. Stat. §52-321, the statute authorizing the creation of spendthrift trusts, trust income is not liable to the claims of a beneficiary's creditors if, *inter alia*, the terms of the trust instrument expressly authorize the trustee to withhold it from the beneficiary. In *Foley* v. *Hastings*, 107 Conn. 9, 139 A. 305 (1927), the benficiary of a testamentary trust assigned his trust income to creditors. Relying upon Connecticut's spendthrift statute, the trustee alleged that the beneficiary lacked the power to assign his trust income because the trust instrument expressly authorized the trustee to withhold income from the beneficiaries.

The trust instrument construed in *Foley* prohibited the beneficiaries from alienating or assigning trust income or principal. However, the State Supreme Court focused its attention upon the specific provisions for the distribution of trust income and principal to determine whether the testatrix had created a spendthrift trust under Connecticut law. Those provisions empowered the trustee:

> [TO] divide [one-third of the residuary estate] . . . into three equal parts or portions, and *to pay over the net income of* the respective portions *to, or apply and use* the same *for the benefit* of the children of my deceased niece . . .: and I further authorize the trustee if at any time the income is in its discretion insufficient *for the support, maintenance and education* of any of said beneficiaries, *to pay over to or use and expend for such beneficiary, so much* of the *principal* of the property then held in trust for him or her *as the trustee in its discretion may deem necessary* for that purpose. (Emphasis added). *Id.* at 11-12, 14.

Harmonizing the testatrix's directions for the payment of trust income with the provisions granting the trustee discretionary power to expend trust principal, the Court construed the trustee's alternative power to "apply and use the [trust income] . . . for the benefit of the beneficiaries" as express authorization for the trustee to expend trust income for the beneficiaries as it saw fit, if it determined that they were not properly applying trust income. Since the trustee's exercise of its authority to expend trust income for the beneficiaries

"[would be] in fact as much a withholding of [income] from the beneficiaries as if the trustee were given authority, at its discretion, not to use it at all for them," *id.* at 14, the Court ruled that the beneficiary lacked power to assign or alienate trust income within the meaning of the spendthrift statute. See *Connecticut Bank & Trust Co.* v *Hurlbutt*, 157 Conn. 315, 327, 254 A.2d 460 (1962).

The terms of Ruth Hale's testamentary trust give the trustee the alternate power "to pay over the net income . . . for the benefit" of Peter Hale,[3] rather than paying it directly to him. Moreover, the trustee is vested with discretion to pay to the beneficiary, or to expend for his benefit, as much of the trust principal as it deems advisable for his comfort and support.

Although their wording is not identical, the terms of Ruth Hale's testamentary trust and the provisions of the testamentary trust construed in *Foley* grant their respective trustee parallel authority. Construing Ruth Hale's testamentary trust consistently with the *Foley* decision, the trustee's alternate power to pay trust income *for the benefit of* Peter Hale, rather than paying it directly to him, expressly authorizes it to withhold income from him by expending it for his benefit. Consequently, pursuant to the spendthrift provision of Conn. Gen. Stat.

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3) Ruth Hale's will divided her residuary estate into two unequal parts to be held in trust by the Union Trust Company. From Part A of her residuary estate, she established a marital trust for her husband, and Part B was divided into twenty equal parts. The pertinent provisions for the administration of Part B are set forth in Clause First, subparagraph II, of a codicil to Clause Fifth of the original will. They provide:

> II. The Trustee shall hold eight (8) equal parts of the trust fund [Part B], and after the payment of all proper charges *shall pay over the net income* therefrom, not less often than quarterly, *to or for the benefit of my son,* PETER POWERS HALE, during the term of his life. The Trustee is authorized at any time and from time to time *to pay over to or for the benefit of my said son so much of the principal of said trust fund as the Trustee, in its discretion, may deem advisable for his comfort and support.* Upon the death of my said son (should he survive me) said trust fund as then constituted shall vest in the then living issue of PETER POWERS HALE, in equal shares, per stirpes. . . . (Emphasis added).

§52-321, trust income payable to Hale cannot be garnished until the trustee has actually paid it to him, see *Hildreth Press Employees Federal Credit Union* v. *Connecticut General Life Ins. Co.*, 30 Conn. Supp. 513, 295 A.2d 54 (1972); Restatement (Second) of Trusts §152, comment h at 314 (1959), and the appellant's state garnishment of trust income is a nullity.[4]

Unlike the provisions requiring the trustee to pay all trust income in quarterly payments to or for the benefit of Peter Hale, the terms of Ruth Hale's trust for the distribution of principal expressly grant the trustee discretion to expend only as much of the trust principal as it may deem advisable for the restricted purpose of Hale's comfort and support. Peter Hale, therefore, does not acquire title to the trust principal unless and until it is paid to him by the trustee, and then only to the amount of principal that is actually paid to him. See *Bridgeport-City Trust Co.* v. *Beach*, 119 Conn. 131, 140, 172 A. 308 (1934); *Cromwell* v. *Converse*, 108 Conn. 412, 431-432, 143 A. 416 (1928). Accordingly, under state law, he does not possess a beneficial interest in trust principal that he can transfer, and the appellant, as his judgment creditor, only can garnish trust principal that has actually been paid to him by the trustee. See

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4) Since the parties had not litigated the issue of whether the terms of Ruth Hale's will created a spendthrift trust, they were afforded the opportunity to submit briefs after the matter was raised by this Court. The appellant and the trustee in bankruptcy contend that *Huntington* v. *Jones*, 72 Conn. 45, 43 A. 564 (1899), is the controlling authority for determining whether Ruth Hale has established a spendthrift trust pursuant to Conn. Gen. Stat. §52-321. However, subsequent decisions in *Carter* v. *Brownell*, 95 Conn. 216, 111 A. 182 (1920), and *Greenwich Trust Co.* v. *Tyson*, 129 Conn. 211, 220-21, 27 A.2d 166 (1942), reveal that although the *Huntington* case was pending before the Court while the General Assembly was considering the passage of a spendthrift statute, it was decided prior to the enactment of Connecticut's spendthrift statute. Moreover, since the newly-enacted spendthrift statute was amended specifically to exclude from its coverage cases that had been pending in the courts prior to its passage, there is some basis for believing that but for this exclusion, its enactment would have altered the decision in the *Huntington* case. See *Greenwich Trust Co.* v. *Tyson*, 29 Conn. at 220-21.

The appellent also asserts that the issue of whether Ruth Hale had created a spendthrift trust was before the Superior Court for New Haven County in the garnishment action. Therefore, she claims that the right of Hale's creditors to reach his trust income is *res adjudicata*.

Since neither Conn. Gen. Stat. §52-321 nor the former general garnishment statute, Conn. Gen. Stat. §52-329, required prior notice and a court hearing, the garnishment procedures did not afford the bankrupt an opportunity, prior to the challenged garnishment, to litigate the issue of whether the testatrix had created a spendthrift trust. In these circumstances, the issuance of a garnishment is not *res adjudicata* of the issues concerning the existence of a spendthrift trust.

The appellant also claims that the bankrupt has waived his right to claim that the trust income is not liable to the claims of his creditors under Conn. Gen. Stat. §52-321. The trustee in bankruptcy joins the appellant in contending that the Union Trust Company, as testamentary trustee, also has waived the right to assert that Ruth Hale's will created a spendthrift trust.

Both defenses lack merit. Conn. Gen. Stat. §52-321 was enacted to permit the settlor of a trust to isolate trust income from the creditors of a trust beneficiary who might otherwise expend it extravagantly. Decisions construing Conn. Gen. Stat. §52-321 have consistently indicated that the trust beneficiary cannot thwart the intent of the settlor by anticipating, alienating or assigning trust income to his creditors. See *Foley* v. *Hastings*, 107 Conn. 9, 139 A. 305 (1927); *Bridgeport-City Trust Co.* v. *Beach*, 119 Conn. 131, 172 A. 308 (1934). It would defeat the purpose of Conn. Gen. Stat. §52-321 if the bankrupt could circumvent his mother's intent to isolate trust income from his creditors by merely failing to raise the spendthrift statute as a defense to garnishment by a state judgment creditor and to the claims of his trustee in bankruptcy.

Similarly, although Article Sixth and Article Seventh of Ruth Hale's will authorize the Union Trust Company to "abandon, adjust, arbitrate, compromise and otherwise deal and settle claims in favor of or against the trust estate," this provision must be harmonized with the spendthrift terms of the trust, see *Connecticut Bank and Trust Co.* v. *Lyman*, 148 Conn. 273, 170 A.2d 130 (1961), and cannot be construed to empower the trustee to make the trust income payable to her son liable to the claims of his creditors.

Finally, the extent of a trustee's powers and duties is determined by the trust instrument and by the applicable rules of law for construing it, and not by the trustee's own interpretation of the terms of the trust or his belief as to the applicable rules of law. Indeed, the trustee commits a breach of trust when he is mistaken as to a rule of statutory or common law and he interprets the trust instrument as authorizing him to do an act that a court later determines he is not empowered to do by the trust instrument. Restatement (Second) of Trusts §201, comment b at 442 (1959). Therefore, it is not within the power of the Union Trust Company to waive the spendthrift trusts provisions by merely failing to examine the applicable law and raise an appropriate defense.

Reilly v. *State*, 119 Conn. 508, 511-12; 177 A. 528 (1935); *Bridgeport-City Trust Co.* v. *Beach*, *supra*, 119 Conn. at 140; *Cromwell* v. *Converse*, *supra*, 108 Conn. at 425; Restatement (Second) of Trusts § 154, comment b at 320-21 and comment c at 321 (1959).

Pursuant to 11 U.S.C. § 110(a)(5):

> The trustee of the estate of a bankrupt . . . shall . . . be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have tranferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered. . . .

The law of the state where the trust was created and the trust property is located determines whether a bankrupt's beneficial interest in trust property was, at the time of his bankruptcy, assignable, transferable or subject to judicial sale or attachment. See *Drummond* v. *Cowles*, 278 F.Supp. 546, 552 (D. Conn. 1968). The trustee in bankruptcy is vested with powers of a judgment creditor having an unsatisfied execution over trust property of the bankrupt that is assignable, transferable or subject to judicial sale or attachment within the meaning of 11 U.S.C. § 110(a)(5). See Restatement (Second) of Trusts § 147, comment d at 307-08 (1959).

Since the provisions of Ruth Hale's trust create a spendthrift trust under Conn. Gen. Stat. § 52-321, title to the bankrupt's beneficial interest in trust income does not vest in the trustee in bankruptcy. See *Drummond* v. *Cowles*, *supra*, 278 F.Supp. at 552-53. Similarly, since the bankrupt is not vested with title to trust principal under Connecticut law and cannot control its distribution, title to his beneficial interest in trust principal also does not vest in the trustee by operation of law. See *Drummond* v. *Cowles*, *supra*, 278 F.Supp. at 549-51.

Notwithstanding this construction of the will, which defeats the claims of the appellant and the trustee in bankruptcy to the bankrupt's beneficial interest in trust property, the appellant has indicated that she wishes to present extrinsic evidence that the testatrix, Ruth Hale, did not intend to isolate the bankrupt's interest in trust income from the claims of his creditors by creating a spendthrift trust. It is doubtful that extrinsic evidence is admissible to contradict or alter the intent of the testatrix expressed by the language of her will. See *Perkins* v. *Corkey*, 147 Conn. 248, 159 A.2d 166 (1960). Because the parties have not fully litigated the issue of whether the bankrupt's interest in trust property is liable to the claims of his creditors, the case is remanded to the Bankruptcy Judge for consideration of the admissibility of extrinsic evidence to vary the terms of Ruth Hale's testamentary trust, and if such extrinsic evidence is admissible, for a determination of whether the bankrupt's interest in trust income is isolated from his creditors pursuant to the spendthrift provisions of Conn. Gen. Stat. § 52-321. Upon remand the Bankruptcy Judge can also consider any claims the parties may have concerning their rights to whatever interest the bankrupt may have in trust principal.

Dated at Hartford, Connecticut, this 14 day of June, 1974.

Jon O. Newman

Jon O. Newman
United States District Judge

APPENDIX E.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

In the Matter of

PETER P. HALE — Bankruptcy No. 37814

Bankrupt

MOTION TO RECONSIDER

Comes now, MABLE GOSTOUT, Appellant in the above styled civil action, and files this her motion for reconsideration of this Court's decision, dated June 14, 1974.

Appellant, MABLE GOSTOUT, avers as her grounds for her motion for reconsideration the following:

I

It is respectfully submitted that this Court by basing its decision on the existence of a "spendthrift trust" (which issue was not before the Bankruptcy Court) without offering the appellant an opportunity to orally argue said issue, has taken the Appellant by surprise.

II

It is respectfully submitted that this Court has overlooked the opinions of legal scholars in interpreting the case of *Huntington v. Jones* 72 Conn. 45, 50; 43 Atl. 564 (1889); as set forth in the following treatises:

Connecticut Civil Procedure (2nd) Edward L. Stephenson (1970) Sec. 67 pp. 282, 285.

MOTION DENIED – NOVEMBER 27, 1974 – J. O. NEWMAN, U.S.D.J.

APPENDIX F.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

In Re

PETER P. HALE — Bankruptcy No. 37814

Bankrupt

NOTICE OF APPEAL

Notice is hereby given that Mable Hurlbutt Gostout, Plaintiff hereby appeals to the United States Court of Appeals for the Second Circuit from the order entered in this action on the 14th day of June, 1974 remanding the instant case to the Bankruptcy Court and further from order of the Court denying the Appellant's Motion to Reconsider, said order dated November 27, 1974.

Notice of the issuance of the order dated November 27, 1974 was not received by counsel until May 13, 1975.

Dated at New Haven, Connecticut this 6th day of June, 1975.

/s/Michael J. Whalen

Michael J. Whalen
Attorney for Mable Hurlbutt Gostout
205 Church Street
New Haven, Connecticut 06510

CERTIFICATION

This is to certify that the foregoing Notice of Appeal has been mailed to the parties in this action, on this 6th day of June, 1975.

/s/Michael J. Whalen

Michael J. Whalen
Commissioner of the Superior Court
205 Church Street
New Haven, Connecticut 06510

APPENDIX G.

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twelfth day of August, one thousand nine hundred and seventy-five.

In re:

Peter P. Hale,

Bankrupt

Mable Hurlbutt Gostout,

Plaintiff-Appellant.

It is hereby ordered that the motion made herein by counsel for the

Peter P. Hale Bankrupt and Union Trust Company, Trustee appellees

dated June 26, 1975 to dismiss the appeal from the United States District Court for the District of Connecticut for lack of jurisdiction be and it hereby is granted.

A. DANIEL FUSARO
Clerk

by Edward J. Guardaro
Senior Deputy Clerk

* * *

BEFORE: HON. JAMES L. OAKES
HON. ELLSWORTH VAN GRAAFEILAND
HON. THOMAS J. MESKILL
Circuit Judges

APPENDIX H.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
NEW YORK CITY

IN RE

PETER P. HALE, } Docket No. 75-8182

BANKRUPT

PROOF OF SERVICE

This is to certify that service of the Notice of Appeal to the Supreme Court of the United States was made by placing a true copy thereof in the United States Mail, postage prepaid, addressed to: Robert Billings, Esquire, 155 North Main Street, Wallingford, Connecticut; Robert L. Fay, Esquire, 86 North Main Street Wallingford, Connecticut; and Herman S. Hodes, Esquire, 273 Orange Street, New Haven, Connecticut, on this 20th day of October, 1975.

/s/ Michael J. Whalen
Michael J. Whalen
Commissioner of the Superior Court
205 Church Street
New Haven, Connecticut 06510

APPENDIX I.

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 23rd day of September, one thousand nine hundred and seventy-five.

In re:

Peter P. Hale,

Bankrupt

Mable Hurlbutt Gostout,

Plaintiff-Appellant.

It is hereby ordered that the motion made herein by counsel for the appellant dated August 22, 1975 to reconsider the order of this court dismissing the appeal herein and to restore the appeal to the court's calendar be and it hereby is denied.

James L. Oakes
Ellsworth A. Van Graafeiland
Thomas J. Meskill

APPENDIX J.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
NEW YORK CITY

IN RE

PETER P. HALE,

BANKRUPT

Docket No. 75-8182

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Mable Hurlbutt Gostout, the Plaintiff in the above-entitled matter, hereby appeals to the Supreme Court of the United States from the order dismissing the complaint dated August 12, 1975 (Motion to Reconsider dated August 22, 1975 denied September 23, 1975) and an order denying a Motion for Remand, said motion having been dated September 9, 1975 and the order thereon being dated October 1, 1975.

This appeal is taken pursuant to 28 U.S.C. Section 1254.
Dated: October 20, 1975.

By /s/Michael J. Whalen
Michael J. Whalen
Attorney for the Plaintiff
Mable Hurlbutt Gostout
205 Church Street
New Haven, Connecticut 06510

APPENDIX K.

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of October, one thousand nine hundred and seventy-five.

In Re;

Peter P. Hale,

Bankrupt,

Mable Hurlbutt Gostout,

Plaintiff-Appellant.

It is hereby ordered that the motion made herein by counsel for the appellant dated September 9, 1975 to remand the appeal herein to the Superior Court of New Haven County, Connecticut pursuant to Title 28 Section 1447(c) be and it hereby is denied.

JAMES L. OAKES
ELLSWORTH A. VAN GRAAFEILAND
THOMAS J. MESKILL
Circuit Judges

APPENDIX L.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

In the Matter of

PETER P. HALE

Bankrupt

In Bankruptcy

No. 37814

ORDER

Upon the foregoing application for an order preserving the interests of the parties in the Estate of Ruth Powers Hale and which appears that the same should be granted it is hereby

ORDERED that the Trustee in Bankruptcy take no action towards appropriating any part of the estate of Ruth Powers Hale for the benefit of the bankrupt estate, and further

ORDERED that the Union Trust Company, acting as Executor and Trustee under the will of Ruth Powers Hale, not release any of the funds of the estate of said Ruth Powers Hale to the Referee in Bankruptcy, Peter Powers Hale, or any person claiming under the interest of said Peter Powers Hale.

Dated this____ day of October 1973.

Robert E. Trevethan,
Referee in Bankruptcy

APPENDIX M.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

In the Matter of

PETER P. HALE

Bankrupt

In Bankruptcy

No. 37814

MOTION FOR PRESERVATION OF INTERESTS

In the above matter Mabel Hurlburt Gostout has this day filed a Notice of Appeal at the District Court from the decision of the Referee in Bankruptcy dated September 27, 1973.

WHEREFORE, said Mabel Hurlburt Gostout prays for an order preserving the interests of the parties in the Estate of Ruth Powers Hale until said appeal is decided.

Mabel Hurlburt Gostout by
Michael J. Whalen,
her Attorney

/s/Michael J. Whalen
Michael J. Whalen

Dated this 3rd day of October 1973.

I hereby certify that a copy of the foregoing was mailed this day postage prepaid to all counsel of record.